IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1092 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAVINBHAI GOKALDAS THAKKAR - Applicant(s)
Versus
DHARAM FILMS DISTRIBUTION THRO' CHARUBEN DINESH PATEL & 1 - Respondent(s)

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Appearance :
MR ASHISH M DAGLI for Applicant(s) : 1,
MR SURESH S PATEL for Respondent(s) : 1,
Mr. RC Kodekar, Addl. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 24/07/2007
ORAL JUDGMENT

Rule. Shri Suresh S. Patel, learned advocate and Shri RC Kodekar, learned APP waive service of Rule on behalf of respondent No.1 and

respondent No.2 respectively. By way of this petition under Article 226/227 of the Constitution of India, the petitioner original-accused has prayed for an appropriate order quashing and setting aside the judgment and order dated 10th April 2007 passed by the learned District & Sessions Judge, Ahmedabad [Rural] in Criminal Revision Application No. 29 of 2007 and also the order dated 5.2.2007 in application below Exh. 163 passed by the learned Trial Judge in Criminal Case No. 1649 of 2002 in rejecting the application of the petitioner, original-accused for issuing process to summon the witnesses for examination and also for production of original letters from the Bank.

2. That respondent No.1 has filed the complaint under Section 138 of The Negotiable Instruments Act in the Court of learned Chief Judicial Magistrate, Mehsana being Criminal Case No. 440/1999; that the petitioner submitted an application Exh. 163 before the learned Trial

Court in Criminal Case No. 1649 of 2002 for issuing Process to summon witnesses for examination and also for production of original letters mentioned in the application as according to the petitioner the original-letter written to the Bank was required to be produced; and therefore he requested to issue summons to the officer of the Bank. The said application was opposed by the original-complainant. The learned Trial Court dismissed the said application on the ground that earlier the officer of the Bank had been examined vide Exhibit 115 and at that time opportunity was given to the accused for cross-examination and the relevant documents/letters etc., could have been got produced during the course of examination. However as the defence side has not made any attempt for production of letters he dismissed the said application. Being aggrieved and dissatisfied with the same the petitioner original-accused preferred Criminal Revision Application No. 29 of 2007 before the learned District and Sessions Judge, Ahmedabad

(Rural) and the learned Additional Sessions Judge, Ahmedabad (Rural) at Ahmedabad by his judgment and order dated 10th April 2007 has dismissed the said revision application confirming the order dated 5.2.2007 passed by the learned Trial Judge in application below Exh. 163 in Criminal Case No. 1649 of 2002. Being aggrieved and dissatisfied with both the orders, the petitioner – original-accused has preferred the present petition under Article 226/227 of the Constitution of India.

3. Shri Dagli, learned advocate appearing on behalf of the petitioner has vehemently submitted that the Trial Court has materially erred in rejecting the application of the petitioner for issuing summons upon the officer of the Bank to produce certain documents which are necessary for the purpose of fair decision in trial, solely on the ground that earlier one clerk of the Bank was examined at Exhibit 115 and ample opportunity was with the defence to cross-examine him and for

production of documents. He has submitted that earlier the Bank Clerk who was examined at Exh. 115 was not from Mehsana and he only used to register all cheques returned and for that purpose only he was called; that he was not authorised by the bank to give the evidence and only because of that reason no formal questions were put to him. It is submitted that after further statement was recorded at Exh. 163 application was given to submit letters dated 13.1.1999 and 16.1.1999 written by the Bank. It is submitted that both the courts below ought to have appreciated that when the case is tried under The Negotiable Instruments Act in such proceedings the Bank witnesses are the key witnesses and the evidence of the Bank witnesses have much more weightage over other witnesses and under the circumstances the learned Trial Court ought to have allowed the application below Exhibit 163. He has relied upon the decision of the Hon'ble Supreme Court in the case of ***Mohanlal Shamji Soni Vs. Union of India and Another,***

reported in *AIR 1991 S.C. Page 1346* in support of his submission that the power to summon any witness can be exercised at any stage of proceedings provided examination of such person is essential for just decision of the case. Therefore it is requested to allow the present petition.

4. The petition is opposed by the learned counsel appearing on behalf of the respondent, original-complainant. Shri Suresh S. Patel, learned advocate appearing on behalf of the original-complainant has submitted that the officer of the Bank was examined earlier at Exhibit 115 and at that time opportunity was given to the accused for examination of the relevant documents, letters etc., could have been got produced during the cross-examination however the defence side has not made any attempt for production of such doucments, and therefore the learned Trial Court has rightly rejected the application below Exh. 163. It is submitted that

the criminal case is of 1999 and only with a view to delay the trial the application has been given and therefore it is requested to dismiss the present petition. At this stage, Shri Dagli, learned advocate appearing on behalf of the petitioner has submitted that any date may be fixed before the trial Court and on such date the petitioner will examine the witnesses who are sought to be summoned and therefore there is no question of further delay in trial.

5. Heard the learned advocates appearing on behalf of the respective parties. By Application, Exh. 163, the petitioner, original-accused has requested to issue summons to the Bank Officer of Mehsana District Cooperative Bank to produce the letter dated 13.1.1999 as well as the letter written by the Bank dated 16.9.1999. The said application was submitted to produce the original-letter written to the Bank and for that purpose it was requested to issue summons to the officer of the Bank. However, the said

application came to be dismissed by the learned Trial Court only on the ground that one Clerk of the Bank was examined at Exh. 115 and he was cross-examined by the defence side on 4.5.2004. However, it is required to be noted that after the said Clerk was examined, a further statement of the accused was recorded under Section 313 of the Cr.P.C., wherein it is specifically mentioned by the petitioner, original-accused that he would like to examine other witnesses also. It is also required to be noted that the Clerk who was examined at Exh. 115 was not authorised to produce any document and he used to keep only the record with regard to return of cheques and nothing further and therefore he could not have produced the letters for which the petitioner has submitted the application at Exh. 163. The learned trial Court has therefore materially erred in rejecting the application only on the ground that earlier the Clerk of the Bank is examined at Exhibit 115. Considering the evidence of the Clerk who is examined at Exh. 115

he was not authorised by the Bank to produce any document; he was examined at the relevant time only for the purpose of producing the record with regard to return of the cheque and nothing further than that. It cannot be disputed that a witness can be examined at any time during the trial provided the examination of such person is essential for just decision of the case. Now, looking to the defence and the application at Exh. 163 submitted by the petitioner and the reason for which the Bank Officer was required to be summoned to produce the aforesaid two letters, it appears to the Court that the said witness is required to be summoned/examined for just decision and if summons is issued to the said Bank Officer to produce the aforesaid two letters, no prejudice would be caused to the complainant as the complainant will be having ample opportunity to cross-examine the said witness. Under the circumstances, both the Courts below have materially erred in rejecting the application below Exh. 163 and in not issuing

summons to the Bank Officer. If the Bank Officer is not summoned and the aforesaid two documents are not produced on record, the defence side is likely to be affected and prejudice is likely to be caused.

6. For the reasons stated above, the petition succeeds. The judgment and order passed by the learned Additional Sessions Judge, Ahmedabad (Rural) dated 10th April 2007 in Criminal Revision Application No. 29 of 2007 and also the order dated 5.2.2007 passed in application below Exh. 163 by the learned Trial Judge, Mehsana in Criminal Case No. 1649 of 2002 are hereby quashed and set aside and the application submitted by the petitioner, original-accused below Exh. 163 in Criminal Case No. 1649 of 2002 is allowed. The learned Trial Court is directed to see that summons is issued to the persons mentioned for production of the documents mentioned in the application and the entire exercise be completed within the period of

2 months from the date of receipt of this order so as to avoid any further delay in the trial. The learned advocate appearing on behalf of the petitioner has assured the Court that there shall not be any delay on their part. Rule is made absolute to the aforesaid extent.

[M.R. Shah, J.]

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